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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 916

THEODORE VARITIMOS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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United States Court of Appeals for the First Circuit to reverse the judgment of the District Court as to the petitioner's conviction under the National Firearms Act for possession, in violation of 26 U.S.C. § 5851, of the same two machine guns which had been transferred without payment of the tax imposed by 26 U.S.C. § 5811, and for transferring, in violation of 26 U.S.C. § 5814, one of those machine guns not in pursuance of a written order on an application form issued by the Secretary of the Treasury or his delegate.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit is reproduced herein as Appendix A, page 15, and appears at page 21 of the certified record. That opinion has not been officially reported as of the date of this petition. No opinion was delivered by the United States District Court for the District of Massachusetts, in which court this case arose.

Jurisdiction

The judgment sought to be reviewed was entered December 9, 1968 in the United States Court of Appeals for the First Circuit.

Jurisdiction to review the judgment is conferred on this Court by 62 Stat. 928 (1948), 28 U.S.C. § 1254(1) (1964), which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods.
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Questions Presented

1. Did the Court of Appeals err in holding the Fifth Amendment privilege against self-incrimination does not bar the petitioner's conviction under 26 U.S.C. § 5851 (1964) for possession of firearms that had been transferred not in pursuance of the written order requirements of 26 U.S.C. § 5814 (1964)?

2. Did the Court of Appeals err in failing to decide that the Fifth Amendment privilege against self-incrimination bars the petitioner's conviction under 26 U.S.C. § 5851 (1964) for possession of firearms that had been transferred without payment of the tax imposed by 26 U.S.C. § 5811 (1964)?

3. Did the Court of Appeals err in failing to decide that the Fifth Amendment privilege against self-incrimination bars the petitioner's conviction for transferring a firearm not in pursuance of a written order on an application form issued by the Secretary of the Treasury or his delegate under 26 U.S.C. § 5814 (1964)?

4. Did the Court of Appeals err in allowing the petitioner's sentence to stand on the basis of its affirmance of the petitioner's conviction on only two of the five counts at issue on appeal?

Constitutional Provisions Involved

AMENDMENT 5

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Statutes Involved

TITLE 26 UNITED STATES CODE (1964)

SECTION 5811. Tax

(a) Rate. There shall be levied, collected, and paid on

firearms transferred in the United States a tax at the rate of $200 for each firearm: *Provided,* That the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), shall be at the rate of $5. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

(b) By whom paid. Such tax shall be paid by the transferor: *Provided,* That if a firearm is transferred without payment of such tax the transferor and transferee shall become jointly and severally liable for such tax.

(c) How paid.

(1) Stamps. Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

Section 5813. Stamps

(a) Affixing. The stamps provided for in section 5811 (c) (1) shall be affixed to the order for such firearm, provided for in section 5814.

Section 5814. Order Forms

(a) General requirements. It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: *Provided,* That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) Contents of order form. Every person so transfer-

ring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Secretary or his delegate. The original thereof, with stamp affixed, shall be returned to the applicant.

(c) Exemption in case of registered importers, manufacturers, and dealers. Importers, manufacturers, and dealers who have registered and paid the tax as provided for in this chapter shall not be required to conform to the provisions of this section with respect to transactions in firearms with dealers or manufacturers if such dealers or manufacturers have registered and have paid such tax, but shall keep such records and make such reports regarding such transactions as may be prescribed by regulations under this chapter.

(d) Supply. The Secretary or his delegate shall cause suitable forms to be prepared for the purposes of subsection (a), and shall cause the same to be distributed to officers designated by him.

Section 5848. Definitions

For purposes of this Chapter—

(1) Firearm. The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

Section 5851. Possessing firearms illegally

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

MASSACHUSETTS GENERAL LAWS ANNOTATED

Chapter 269, § 10 (1959) . . . Whoever, except as provided by law, possesses a machine gun as defined in [c. 140, § 121] . . . , without permission under [c. 140, § 131] . . . , shall be punished by imprisonment in the state prison for life or for any term of years.

Chapter 140, § 131 (Supp. 1968). The chief of police or the board or officer having control of the police in city or town, or the commissioner of public safety, or persons authorized by them, respectively, after an investigation, may, upon the application of any person, including a minor eighteen or over who has the written consent of his parent or guardian, residing or having a place of business within their respective jurisdiction, except an alien, a person who has been convicted of a felony or of the unlawful use, possession or sale of narcotic or harmful drugs or a minor under the age of eighteen, issue a license to such applicant to carry firearms in the commonwealth or to possess therein a machine gun, if it appears that he is a suitable person to be so licensed, and that he has good reason to fear injury

to his person or property, or for any other proper purpose, including the carrying of firearms for use in target practice only. . . .

Regulations Involved

Subpart E of part 179 of Title 26, Code of Federal Regulations (1968), reproduced at Appendix B herein, page 23. Form 4 (Firearms) is reproduced at Appendix C herein, page 29.

Statement of the Case

The petitioner was charged by a fourteen count indictment filed in the United States District Court for the District of Massachusetts with various violations (hereinafter specified) of the National Firearms Act, 48 Stat. 1237 (1934), as amended, 26 U.S.C. §§ 5801-5862 (1964) (R. 5). The petitioner was tried, jury waived (R. 2), on all counts, and was found guilty on twelve of them (R. 3). After trial and before the date scheduled for disposition (R. 3), this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39 (1968), *Grosso* v. *United States,* 390 U.S. 62 (1968), and *Haynes* v. *United States,* 390 U.S. 85 (1968), were announced and the district court (the government not opposing (R. 4)) allowed the petitioner's motion to dismiss those seven counts of the indictment bottomed upon the petitioner's failure to *register* firearms as required by 26 U.S.C. § 5841 (R. 4 and 10; see R. 5-9). The remaining five counts on which the petitioner was convicted, upon which he was sentenced to concurrent terms of imprisonment of three years on each count (R. 12-13), averred that the petitioner:

(a) in violation of 26 U.S.C. § 5851,

(1) knowingly possessed two machine guns which

had been transferred not in pursuance of the written order requirements of 26 U.S.C. § 5814 (Counts 4 and 11), and

(2) knowingly possessed the same two machine guns which had been transferred without payment of the tax imposed by 26 U.S.C. § 5811 (Counts 5 and 12); and

(b) in violation of 26 U.S.C. § 5814, knowingly transferred one of those machine guns not in pursuance of a written order on an application form issued by the Secretary of the Treasury or his delegate (Count 6). (R. 6-9).

The petitioner moved, after trial, to dismiss these counts on the grounds they were based upon his failure to provide incriminating information and therefore violated his Fifth Amendment privilege (R. 11). This motion and the petitioner's motion for judgment of acquittal, filed after trial, were both denied (R. 10 and 11) and the petitioner appealed to the United States Court of Appeals for the First Circuit (R. 14).

On appeal, the judgment of the district court was affirmed as to Counts 4 and 11 of the indictment, *viz.*, those counts which alleged violations of 26 U S.C. § 5851 in possessing machine guns which had been transferred not in pursuance of the written order requirements of 26 U.S.C. § 5814 (R. 29). The First Circuit entered no judgment in respect of the other three counts at issue on the basis that the concurrent sentences imposed by the district court were well within that which could have been imposed under a single count (R. 28).

Reasons for Allowance of the Writ

This case raises important questions of federal and

constitutional law which have not been, but should be, settled by this Court and presents questions of federal and constitutional law which the petitioner believes the court of appeals has decided in a way in conflict with the rationale of the decisions of this Court in *Marchetti* v. *United States,* 390 U.S. 39 (1968), *Grosso* v. *United States,* 390 U.S. 62 (1968), and *Haynes* v. *United States,* 390 U.S. 85 (1968).

I. The Court Of Appeals Has In This Case Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The narrow issue presented here is whether enforcement against the petitioner of 26 U.S.C. § 5814 and the clause within § 5851 referring to §§ 5811 and 5814 is constitutionally permissible in the light of the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment.

Haynes, supra, did not reach the precise issue involved in this case. There this Court was called upon to determine if the *registration* requirements of the National Firearms Act, 26 U.S.C. § 5841, violation of which is made criminal by § 5841 and the clause within § 5851 referring to § 5841, exceeded constitutional limitations. Here the issue is whether the *order form* requirements of the Act, 26 U.S.C. §§ 5811 and 5814, suffer from the same infirmities.

Prior to the *Marchetti, Grosso,* and *Haynes* trilogy it appeared to be the unanimous federal court rule that the transfer and transfer tax provisions of the Federal Firearms Act did not involve violations of the Fifth Amendment privilege against self-incrimination. Since the decision of those cases, the federal courts of appeals and district courts which have been called upon to determine the actual dimensions of the Fifth Amendment as it applies

to the requirements of the National Firearms Act have displayed a compelling need for further guidance.

It has recently been commented:

> "Few statutory thickets are more tangled than the one confronting a court that must determine how far a federal gun defendant's self-incrimination privilege extends beyond the actual holding of *Haynes* v. *U.S.*" 4 CRIM. LAW REP. 2233 (Bur. Nat'l. Affairs, Inc., December 18, 1968).

As an apparent consequence of such a dilemma, the courts of appeals faced with these questions have limited the application of the Fifth Amendment to those requirements of the National Firearms Act as inevitably incriminating as the registration requirements involved in *Haynes, supra.* Thus, the Eighth Circuit, in *DePugh* v. *United States* and companion cases, 401 F.2d 346 (8th Cir. 1968), held the Fifth Amendment provides a full defense to prosecutions for conspiracy to violate 26 U.S.C. § 5811, by transferring firearms without paying the required tax, and 26 U.S.C. § 5821, by making firearms without paying the required tax, because the degree of certainty of incrimination involved in those requirements of the National Firearms Act is equal to that involved in *Haynes.* Said the court:

> "Here again we are confronted with a situation we cannot distinguish from the Supreme Court cases [*Marchetti, Grosso,* and *Haynes*] as there obviously is no material difference in the requirements of the statutes and application forms provided by the Secretary relative to the self-incriminating information required of the taxpayer. *If we could perceive any reasonable significant difference,* we would be inclined to be swayed by it because of the public interest in law

> enforcement coupled with the fact that there are a numerosity [sic.] of firearm cases pending in the inferior federal courts, which make the subject one of national import best reserved for resolution by the Supreme Court, if possible." 401 F.2d at 351. (Emphasis added.)

But, with respect to the charge based on possession of a firearm on which the making tax had not been paid, in violation of 26 U.S.C. § 5851, the Eighth Circuit detected a distinction from *Haynes* as a result of certain dicta in *Haynes, supra,* 390 U.S. at 92-93, and held it to be a valid and proper charge, "at least until the Supreme Court holds otherwise." 401 F.2d at 352.

In this case, the First Circuit has shown the same inclination, but in a slightly different manner. Here the First Circuit appears to have preferred to find that any degree of certainty of incrimination less than that involved in *Haynes* is "only a speculative and insubstantial hazard of incrimination." —— F.2d at —— (Page 21, *infra*) (R. 27).

Recently the United States District Court for the District of Delaware, facing essentially the same problem in *United States* v. *Thompson,* —— F. Supp. —— (D. Del., November 19, 1968), found that the risks of incrimination to a transferee created by 26 U.S.C. §§ 5811 and 5814 are "both substantial and real . . . and not trifling or imaginary," —— F. Supp. at ——, but, because those risks are "not so blatantly violative of the privilege against self-incrimination as the Haynes Court found Sec. 5841 to be," the court limited the Fifth Amendment privilege in such cases to instances where "it appears to the court that defendant's compliance with the transfer statute would, in all probability, have been incriminatory." — F. Supp. at —.

The petitioner cannot believe the Fifth Amendment can be so tortured as to (a) deny its application to any case distinguishable from the precise holding of *Haynes* because of the public interest in law enforcement (*DePugh*), (b) deny its application upon a finding, ipsi dixit, that any degree of certainty of incrimination less than that involved in *Haynes* is "only a speculative and insubstantial hazard of incrimination" (this case), and (c) limit the application to defendants who can establish to the satisfaction of the court their guilt under some other state or federal statute (*Thompson*). The petitioner further believes that the cases decided by the federal courts of appeals and district courts, see, also *United States* v. *Shurelds, et als,* —— F. Supp. —— (N.D. Ohio, July 19, 1968), display a lack of understanding of the *Marchetti, Grosso,* and *Haynes* trilogy which can be settled only by this Court. In the light of the Eighth Circuit's statement in *DePugh, supra,* that "there are a numerosity of firearm cases pending in the inferior federal courts, which make the subject one of national import," 401 F.2d at 351, the question should be settled by this Court.

II. The Court of Appeals Has in This Case Decided a Federal Question in a Way in Conflict With the Rationale of the Decisions of This Court in *Marchetti, Grosso,* and *Haynes.*

Marchetti, supra, teaches that the constitutional privilege against self-incrimination cannot be deemed to have been waived in instances where those " 'inherently suspect of criminal activities' have been commanded either to cease their criminal activities or to provide information incriminating to themselves, and have ultimately elected to do neither." 390 U.S. at 52. From *Haynes, supra,* we learn that the limited definition of a "firearm" contained in

26 U.S.C. § 5848(1) is calculated to insure the application of the provisions of the National Firearms Act only to those firearms "used principally by persons engaged in unlawful activities." 390 U.S. at 87. Further, it is clear that possession of firearms, and particularly machine guns, is widely prohibited in many circumstances by both federal and state laws. See, e.g., 15 U.S.C. §§ 902(e) and (g) and 905(a) (1964); Mass. Gen. Laws Ann. c. 269, § 10 (1959). Yet we find the First Circuit here saying that the Fifth Amendment does not apply to the transferee of a machine gun because:

> "A person intending to violate the law would not initiate a form which can be completed only by obeying the law....
>
> "We cannot believe that the Fifth Amendment can be so tortured as to proscribe the use of an application form which initiates a transaction which can be lawfully completed." —— F.2d at —— (Page 20, *infra*) (R. 26).

The petitioner believes this rationale is in direct conflict with that of *Marchetti, Grosso,* and *Haynes.* The First Circuit rationale applied to the facts in *Marchetti,* for example, would seem to lead to the conclusion that the wagering tax provisions involved in *Marchetti* are not violative of the Fifth Amendment because the defendant could lawfully engage in gambling in Nevada and the defendant in that case would not have initiated the forms unless he intended to do so.

The petitioner believes the holdings of this Court in *Marchetti, Grosso,* and *Haynes* establish that in an area of activity permeated with criminal statutes, the government may not enforce disclosure requirements directed principally against a group inherently suspect of criminal

activities to punish criminally those persons who have defended a failure to comply with those requirements with a proper assertion of the privilege against self-incrimination, and that the holding of the First Circuit in this case permits precisely that.

The petitioner also urges this Court to grant the writ to determine the propriety of the affirmance of the petitioner's sentence upon affirmance of the conviction on two of the five counts involved on appeal, after a trial on fourteen counts, and the failure of the court of appeals to decide three of the counts at issue on appeal. In this respect, the decision here is in conflict with the decision of the Second Circuit in *United States* v. *Hines*, 256 F.2d 561 (2d Cir. 1958).

Conclusion

For the reasons stated, it is respectfully prayed that this petition for a writ of certiorari be granted, that the decision of the court of appeals be reversed, and that the judgment of the district court be vacated.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7109.

THEODORE VARITIMOS,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Murray H. Falk, with whom *Moulton, Looney, Mazzone & Falk* was on brief, for appellant.

Robert D. Canty, Assistant U. S. Attorney, with whom *Paul F. Markham*, United States Attorney, and *Eric M. Rubin*, Attorney, Department of Justice, were on brief, for appellee.

December 9, 1968.

COFFIN, *Circuit Judge.* This is an appeal from a conviction on five counts of an indictment charging violation of the National Firearms Act, 26 U.S.C. § 5814, § 5851 (1964).[1] The issue presented is whether or not the order

[1] The five counts included: (1) two counts that the defendant in violation of section 5851 knowingly possessed a machine gun which had been transferred in violation of section 5814; (2) two counts that the defendant in violation of section 5851 knowingly possessed a machine gun on which the tax imposed by section 5811 had not been paid; (3) one count that the defendant had transferred a machine gun in violation of section 5814.

Section 5851 provides that it shall be unlawful to receive or possess a firearm as defined in the Act which has been transferred in

form requirements of 26 U.S.C. § 5814 (1964) and the tax required by 26 U.S.C. § 5811 (1964) abridge appellant's privilege against self-incrimination under the Fifth Amendment of the Constitution.

We consider first the counts alleging violation of 26 U. S. C. § 5851 (1964) for receipt or possession as a transferee of a firearm as defined in 26 U.S.C. § 5848 (1964) which has been transferred in violation of 26 U.S.C. § 5814 (1964). Section 5814 of the National Firearms Act provides that it shall be unlawful to acquire a firearm as defined by the Act except pursuant to a written order form issued by the Secretary of the Treasury.[2] Appellant, relying on *Haynes* v. *United States,* 390 U.S. 85 (1968), contends that the order form requirement of section 5814 is violative of the privilege against self-incrimination as guaranteed by the Fifth Amendment. As the discussion which follows will show, appellant's reliance is misplaced.

Haynes, supra, involved a violation of section 5851 for

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violation of the Act. This would include transfers made without use of the order form required by section 5814 (*see* n. 2 *infra*) and without payment of the tax imposed by section 5811. Section 5811 requires that the transferor pay a tax on the firearm to be transferred by affixing the proper tax stamps on the order form of section 5814. If the transferor does not pay the tax, the transferee is jointly and severally liable for its payment.

[2] The relevant parts of section 5814 are as follows:

"(a) General requirements. It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Secretary or his delegate. Such order shall identify the applicant by means of identification as may be prescribed by regulations under this chapter: Provided, that, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) Contents of Order Form. Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Secretary or his delegate. The original thereof, with stamp affixed, shall be returned to the applicant."

possession of a firearm which had not been registered under section 5841. There the Supreme Court held that the violation was essentially for failure to register and that registration would have required a direct incrimination by petitioner. Following the reasoning of *Haynes, supra,* we must ask two questions: first, is conviction under section 5851 meaningfully distinguishable from a conviction under section 5814?; and, if it is not, does the order form requirement of section 5814 violate the privilege against self-incrimination?

With regard to the first question, the Supreme Court indicated in *Haynes, supra,* that section 5851 as it relates to section 5814 punishes receipt or possession of a firearm which has not been transferred in compliance with section 5814 rather than failure to comply with section 5814. *Haynes, supra,* at 92. In *Haynes* the Supreme Court did not pass on the constitutional status of this construction of the statute and it could be argued that the statute as written purports to punish receipt or possession of a firearm which had been transferred unlawfully at some remote point in time as well as an immediate unlawful transfer.[3] This interpretation would pose no constitutional problem up to the point where a prospective transferee complies with section 5814, since, prior to so complying, he is not required to do anything except to decline acquisition of a firearm which was "at any time" illegally transferred.

But there might well be a constitutional infirmity were section 5851 construed to permit punishing a transferee where the immediate acquisition was made in compliance with the act but where, unknown to him, at some prior point in time the firearm had been transferred unlawfully.

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[3] Section 5851 provides in part that:

"It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846. . . ."

Indeed, if the statute were so construed, the very act of compliance with the statute through use of the order forms would provide incriminating evidence.

We do not believe that such an intent can be attributed to Congress and we construe the statute so as to avoid the constitutional issue. *Ashwander* v. *Valley Authority*, 297 U.S. 288, 348 (1936) (concurring opinion). We think that Congress employed the "at any time" language of section 5851 to indicate that a possessor of a firearm which has "at any time" been unlawfully transferred may not exculpate himself merely by showing that he was not involved in the original unlawful transfer. *Russell* v. *United States*, 306 F. 2d 402, 411 (9th Cir. 1962). That is not to say, however, that one who acquired a firearm in conformity with the act may be punished for prior illegal transfers by other persons of the same firearm.

Section 5814 clearly contemplates that a firearm may be lawfully acquired by following procedures set forth therein. A contrary interpretation would be inconsistent with the clear implication of the first sentence of section 5814: "It shall be unlawful . . . to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article . . . ." We can only equate "it shall be unlawful . . . except" with "it shall be lawful . . . if" transfer pursuant to section 5814 takes place. We therefore hold that compliance with section 5814 means that a transferee may not be punished, federally, because the same firearm was illegally transferred in the past by others.[4] Thus, when section 5851 states that possession

[4] This is in keeping with the purpose of the National Firearms Act. Congress could have prohibited the transfer of firearms altogether. Instead, it chose to permit transfer subject to well-defined regulation. The order form requirements of section 5814 are central to the legislative scheme in that compliance with section 5814 furnishes the government with the information necessary to effective regulation. Obviously, acquisition of a firearm in conformity with section 5814

is prima facie proof of violation, it refers, not to possession acquired under section 5814, but to possession unsupported by compliance with the Act.

Assuming that section 5851 is in fact directed at failure to use the order forms required by section 5814,[5] there would still be no violation of the privilege against self-incrimination. Appellant's argument is that he is in the same position as the petitioners in *Marchetti* v. *United States,* 390 U.S. 39 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968), who by the very act of filing the wagering tax forms and paying the tax were admitting that they were presently engaged in unlawful conduct or that they planned to do so in the future.[6] Similarly, appellant compares himself to the petitioner in *Haynes, supra,* where

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satisfies the Congressional purpose and prevents the evil which section 5851 is designed to cover.

We acknowledge that our interpretation considerably constricts the meaning of "at any time" in section 5851. While subsequent Congresses shed no light on the intent of earlier ones, we take some comfort in the recent action of the 90th Congress. In section 5861 of the Gun Control Act, Public Law 90, the successor of section 5851, the words "at any time" have been entirely read out of the legislation.

[5] In *Haynes, supra* at 92, the Supreme Court indicated that section 5851 as it referred to section 5814 punished for receipt or possession of a firearm transferred in violation of section 5814. However, with respect to section 5851 as it referred to section 5841, the Court stated that:

> "... we find it significant that the offense defined by §5851 is the possession of a firearm which has not been registered 'as required by section 5841.' In the absence of persuasive evidence to the contrary, the clause's final words suggest strongly that the perimeter of the offense which it creates is to be marked by the terms of the registration requirement imposed by §5841."

This statement in *Haynes* arguably suggests, despite the Court's prior remarks, that the "perimeter of the offense" of section 5851 as it relates to section 5814 is in fact the failure to follow the order form procedure of section 5814, rather than receipt or acquisition of a firearm not transferred in compliance with section 5814.

[6] In *Marchetti, supra,* the Court observed that every state except Nevada has broad prohibitions against wagering, the very conduct which would be admitted by the filing of the return and payment of the tax. 390 U.S. at 44 n. 5.

the act of registering the firearm would have constituted a direct admission that an unregistered firearm was acquired in violation of the National Firearms Act. But as to appellant there is no substantial hazard that the information required by the order form will furnish a "link in the chain" leading to a conviction for illegal activity. That one has properly started the legal process of qualifying to receive a firearm is no indication that he will subsequently depart from that process. Unlike the defendant's compelled announcement in *Marchetti* of his engaging in conduct which was necessarily illegal in his state, the averment here of an intention to receive firearms foretold an action which could be executed in a lawful manner by an unrestricted category of individuals. The existence of such a substantial, realistic, and lawful alternative affords Congress adequate ground within which to carry out a good faith, non-incriminatory purpose. The comparison of appellant to the petitioner in *Haynes, supra,* is even more untenable. In *Haynes* the registration of the firearm would not only have supplied a link in the chain but the entire chain.

Appellant's argument is essentially this — that a person bent on circumventing the law as to the transfer of firearms who chooses to fill out part of the form while secretly intending not to have the remainder completed (by securing the proper authorizations) is incriminating himself. This argument seems to us to be unpardonably hypothetical. A person who initiates the execution of the form can only intend to have it completed. If this happens, there can be no incrimination. A person intending to violate the law would not initiate a form which can be completed only by obeying the law. Here, too, there is no incrimination.

We cannot believe that the Fifth Amendment can be so tortured as to proscribe the use of an application form which initiates a transaction which can be lawfully completed.

Appellant presses a rather interesting argument based on the Supreme Court's indication in *Haynes, supra,* that the National Firearms Act is directed at persons engaged in unlawful activity. 390 U.S. 85, 87 n. 4. Apparently, appellant's position is that even though a firearm is acquired lawfully, its acquisition focuses suspicion on the transferee because of the legislative purpose of the Act. Thus, should a transferee subsequently engage in illegal activity involving a firearm, the order form would provide a link in the chain leading to conviction. The answer to this argument is that the protection of the Fifth Amendment privilege is inapplicable to prospective acts involving only a speculative and insubstantial hazard of incrimination. *Marchetti, supra* at 54.

In *Marchetti* the fact that 49 states prohibited the very activity disclosed by payment of the tax constituted a real hazard of incrimination. But here there is no prohibition, either state or federal, against possession of a firearm lawfully acquired under the National Firearms Act.[7] Nec-

[7] The regulations contemplate that, before submitting the application form to federal officials for approval, an intended possessor obtain a certificate ". . . of the local chief of police, sheriff of the county, United States Attorney, United States Marshal, or other person whose certificate may in a particular case be acceptable . . .certifying . . . that the firearm is intended by the applicant for lawful purposes." 26 C.F.R. § 179.99 (1968).

Indeed, in this case had appellant procured such a certificate from his local police chief, Mass. Gen. Laws, c. 269 § 10 would have posed no problem. Mass. Gen. Laws, c. 269 § 10 provides that it shall be unlawful to possess a machine gun without permission. However, Mass. Gen. Laws, c. 140 § 131 provides that a local chief of police may give such permission on application by a party through the granting of a license. Thus, in the present case the appellant could have simultaneously complied with both 26 C.F.R. § 179.99 and Mass. Gen. Laws, c. 140, § 131. Indeed, by its express terms 26 C.F.R. § 179.99 seems to contemplate that the certificate will be obtained only if all state law provisions have been satisfied.

We acknowledge the possibility that a U.S. Attorney or U.S. Marshal might so certify, in ignorance of state law, with the result that a citizen could have gone through the required procedure only to

essarily, a question of incrimination can arise only if a wholly different criminal act is performed at some point in the future. To accept appellant's argument would be tantamount to saying that a pharmacist should not be required to acknowledge receipt of certain drugs since he may secretly intend to distribute them without a prescription, and would therefore be supplying evidence of receipt which would incriminate him.

We affirm appellant's conviction on the counts four and eleven discussed above. We need not pass on the remaining three counts.[8] The concurrent sentences imposed by the trial court are well within that which could be imposed under a single count.[9] *United States* v. *Gainey,* 380 U.S. 63 (1965). In addition, there is no suggestion that appellant received a greater sentence due to the presence of multiple counts. *Saville* v. *United States,* ——F. 2d—— (1st Cir. 1968).

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find that he was actively in violation of state law. Such a possibility is not only, in our opinion, remote but we do not think it unreasonable to place upon the prospective acquirer, if he has any doubt of the legality of his transaction, the burden of seeking out the local official whose signature would effectively give him protection under state law.

[8] While we need not decide the status of the remaining three counts we note that the counts involving receipt or possession of a firearm upon which the tax imposed by section 5811 has not been paid appear to pass muster under *Haynes*, *supra* n. 3, in light of the Supreme Court's interpretation of section 5851 as it relates to section 5811. 390 U.S. at 92. If, on the other hand, the "perimeter" of the offense is failure to pay the tax, a serious question of self-incrimination would be presented. *See* n. 5 *supra.* Finally, the count dealing with transfer in violation of section 5814 raises substantial Fifth Amendment issues since the order form requires the giving of the serial number of the firearm, the maker, and most importantly, an admission of ownership.

[9] 26 U.S.C. § 5861 (1964) provides that the penalty for violation of the Act shall be up to $2,000 in fines or up to five years imprisonment, or both.

APPENDIX B

Part 179 of Title 26, CODE OF FEDERAL REGULATIONS (1968)
SUBPART E — TRANSFER TAX

§ 179.95 *Scope of tax.*

Except as otherwise provided (see §§ 179.103 and 179.-104), each transfer of a firearm in the United States is subject to tax to be represented by an adhesive stamp of the proper denomination bearing the words "National Firearms Act" to be affixed to the Form 4 (Firearms) (see §§ 179.98, 179.170, and 179.171).

§ 179.96 *Rate of tax.*

The transfer tax imposed with respect to firearms transferred within the United States is at the rate of $200 for the transfer of each firearm, except that, the transfer tax imposed with respect to any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848 (5), I.R.C., is at the rate of $5 for the transfer of each such weapon.

§ 179.96a *Liability for tax.*

The tax imposed on the transfer of a firearm shall be paid by the transferor, except that, if a firearm is transferred without payment of the proper tax, the transferor and transferee shall be jointly and severally liable for such tax.

§ 179.97 *Transfer tax in addition to import duty.*

The transfer tax imposed by section 5811 of the Internal Revenue Code of 1954 is in addition to any import duty (see § 179.132).

APPLICATION AND ORDER FOR TRANSFER OF FIREARM

§ 179.98 *Written application and order required for transfer of firearm.*

Except as otherwise provided, no firearm may be transferred in the United States unless a Form 4 (Firearms) covering the transfer of the firearm has been approved by the Director, Alcohol and Tobacco Tax Division, Washington, D.C. 20224. The person seeking to obtain a firearm must complete the items in Form 4 (Firearms), in duplicate, relating to the applicant, execute said form as the applicant, and then submit the form, in duplicate, to the person transferring the firearm. The person desiring to transfer the firearm will complete the items in the Form 4 (Firearms), in duplicate, relating to such a person, affix to the original a "National Firearms Act" stamp of the proper denomination in the space provided (§179.96), properly cancel such stamp (§ 179.101), execute the said form, and submit the said form, in duplicate, to the Director for approval. Upon approval, the original of the Form 4 (Firearms) will be returned to the transferor, who may then deliver the firearm and the approved original Form 4 (Firearms) to the applicant.

§ 179.99 *Identification of applicant.*

If the applicant is an individual, he shall attach to each copy of the application an individual photograph of himself, taken within one year prior to the date of such application, and shall affix his fingerprints to such application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal or such other person whose

certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that the firearm is intended by the applicant for lawful purposes.

§ 179.100 *Requirements for approval of application and order for transfer.*

The Form 4 (Firearms), must be forwarded, directly, in duplicate, by the transferor to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D.C. 20224. The Director, Alcohol and Tobacco Tax Division, will consider the application for approval or disapproval. If the application is approved, the Director, Alcohol and Tobacco Tax Division, will return the original thereof to the transferor, who may then deliver the firearm to the applicant, together with the original Form 4 (Firearms) with the "National Firearms Act" stamp attached thereto. If the application is disapproved, the original Form 4 (Firearms) with the "National Firearms Act" stamp attached thereto will be returned to the transferor with the reasons for disapproval stated on the form.

§ 179.101 *Cancellation of stamp.*

The same method of cancellation as prescribed in § 179.81 shall be used.

CONCERNING EXEMPTIONS FROM TRANSFER TAX

§ 179.103 *Special (occupational) tax payers.*

The transfer tax and the requirements as to the use of Form 4 (Firearms) (§ 179.98) are not applicable where importers or manufacturers in Class 1, pawnbrokers in Class 3 and dealers in Class 4, who have registered and paid special (occupational) tax, transfer any type

of firearm to other like manufacturers, like importers, or like dealers (including pawnbrokers), who have registered and paid special (occupational) tax. Manufacturers in Class 2 and dealers in Class 5 may transfer only the types of firearms which they are authorized to produce or deal in to any other properly registered special (occupational) tax payer without payment of transfer tax and without complying with the requirement as to the use of Form 4 (Firearms). Similarly, importers, manufacturers in Class 1, pawnbrokers in Class 3 and dealers in Class 4, may transfer only guns with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and firearms classified as "any other weapon" to manufacturers in Class 2 or dealers in Class 5 without payment of transfer tax and without complying with the requirements relating to the use of Form 4 (Firearms). The class of a special (occupational) tax payer (Class 1 through Class 5) referred to in this section shall be determined by the rate of special (occupational) tax paid by the manufacturer, importer or dealer, as provided in section 179.51. Before a tax-free transfer is made, the transferor must satisfy himself that the transferee is a registered special (occupational) tax payer.

§ 179.104 *Peace officers.*

Pursuant to section 5812, I.R.C., the following persons are hereby designated as peace officers entitled to receive firearms without payment of transfer tax or the use of Form 4 (Firearms): Sheriffs, chiefs of police, commissioners of police, superintendents or other chief officers of State police units, including State highway patrols, director of public safety, and bona fide subordinate officers under the command of the aforementioned persons upon appropriate recommendation of the officials designated. However, when

any firearm is transferred tax-exempt under this section, §§ 179.105 and 179.106 must be complied with.

§ 179.104a *Government Agencies.*

Firearms may be transferred to the United States Government, any State, Territory, or possession of the United States, or to any political subdivision thereof, or to the District of Columbia, without payment of transfer tax or the use of Form 4 (Firearms). However, when any firearm is transferred tax-exempt under this section, §§ 179.105 and 179.106 must be complied with.

§ 179.104b *Unserviceable firearms.*

An unserviceable firearm may be transferred as a curiosity or ornament without payment of transfer tax or the use of Form 4 (Firearms). However, when any unserviceable firearm is transferred tax-exempt under this section, § 179.105 must be complied with.

§ 179.105 *Notice of exemption and transfer.*

Where a transfer is claimed to be exempt from tax under section 5812 I.R.C., as implemented by §§ 179.104, 179.104a, and 179.104b, a notice of exemption and transfer must be immediately executed by the transferor in triplicate on Form 5 (Firearms), and the original forwarded to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D.C. 20224, the duplicate retained by the transferor, and the triplicate furnished to the transferee. The notice must show the name and address of the transferor and transferee, a description of the firearm, the date of the transfer, the basis of the exemption claimed, and any other evidence which the Director, Alcohol and Tobacco Tax Division, may require. In addition, the transferor must establish that the transferee has received the firearm. Acceptable proof of the receipt of a

firearm may be in the form of a document such as a bill of lading showing shipment of the firearm to the transferee, or a signed statement by the transferee, or by a responsible officer or official on behalf of the transferee, acknowledging receipt of the firearm. Any document evidencing receipt of the firearm by the transferee must be securely affixed to the original Form 5 (Firearms) furnished to the Director, Alcohol and Tobacco Tax Division.

§ 179.106 *Responsibility of transferor for exempt status of transferee.*

Transfers under section 5812 I.R.C., as implemented by §§ 179.104 and 179.104a, may be made prior to forwarding Form 5 (Firearms) to the Director, Alcohol and Tobacco Tax Division. However, before a tax-free transfer is made, the transferor should satisfy himself of the exempt status of the transferee and the bona fides of the transaction. If not fully satisfied, he should communicate with the Director, Alcohol and Tobacco Tax Division, and report all the circumstances and await said Director's advice before making the transfer. If transfers to unauthorized persons, or transfers otherwise unwarranted, are made, tax and penal liability will be incurred.

FORM 4 (FIREARMS)
(REV. JUNE 1967)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

Alcohol and Tobacco Tax Division

APPLICATION AND ORDER FOR TRANSFER OF FIREARM

(Chapter 53, Internal Revenue Code)

(Please complete in duplicate, after reading instructions on reverse.)

THE FOLLOWING ITEMS WILL BE COMPLETED BY APPLICANT

The undersigned hereby makes application as required by Section 5814 of the Internal Revenue Code for the transfer of a firearm to him.

1. DATE

2. NAME *(Firm or individual, as applicable.)*

3. SOC. SEC. OR EMP. IDENT. NO.

4. ADDRESS *(Number, Street, City or Town, State, ZIP Code)*

5. NAME AND ADDRESS OF PERSON AUTHORIZED TO EXECUTE THIS APPLICATION IF APPLICANT IS OTHER THAN AN INDIVIDUAL

6. STATE WHETHER YOU HAVE EVER BEEN CONVICTED OF A FELONY ☐ YES ☐ NO

7. DATE OF BIRTH

8. PLACE OF BIRTH

I declare under the penalties of perjury that the firearm is being purchased for a lawful purpose, and that the answers given in response to questions 2 to 8, inclusive, are, to the best of my knowledge and belief, true, correct, and complete.

9. SIGNATURE OF APPLICANT

10. TITLE *(If not an officer of firm, state whether individual owner.)*

Sheet 2 of this form also must be furnished in duplicate if applicant is an individual.

THE FOLLOWING ITEMS WILL BE COMPLETED BY PERSON DESIRING TO TRANSFER THE FIREARM

11. KIND OF FIREARM *(Machine gun, submachine gun, shotgun or rifle, muffler or silencer, or any other weapon, etc.)*

12. LENGTH OF BARREL *(Inches)*

13. MODEL

14. CALIBER OR GAUGE

15. SERIAL NUMBER

16. OTHER MARKS OF IDENTIFICATION

17. NAME AND ADDRESS OF MANUFACTURER OF FIREARM *(If known)*

18. NAME AND ADDRESS OF TRANSFEROR *(Print or type name of firm or individual.)* *(Number, Street, City or Town, State, ZIP Code)*

A $5.00 or $200.00 "NATIONAL FIREARMS ACT" stamp, obtainable from your DISTRICT DIRECTOR OF INTERNAL REVENUE, must

APPENDIX C

FORM 4 (FIREARMS)
(REV. JUNE 1967)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

Alcohol and Tobacco Tax Division

APPLICATION AND ORDER FOR TRANSFER OF FIREARM

(Chapter 53, Internal Revenue Code)

(Please complete in duplicate, after reading instructions on reverse.)

THE FOLLOWING ITEMS WILL BE COMPLETED BY APPLICANT

The undersigned hereby makes application as required by Section 5814 of the Internal Revenue Code for the transfer of a firearm to him.

1. DATE

2. NAME *(Firm or individual, as applicable.)*

3. SOC. SEC. OR EMP. IDENT. NO.

4. ADDRESS *(Number, Street, City or Town, State, ZIP Code)*

5. NAME AND ADDRESS OF PERSON AUTHORIZED TO EXECUTE THIS APPLICATION IF APPLICANT IS OTHER THAN AN INDIVIDUAL

6. STATE WHETHER YOU HAVE EVER BEEN CONVICTED OF A FELONY ☐ YES ☐ NO

7. DATE OF BIRTH

8. PLACE OF BIRTH

I declare under the penalties of perjury that the firearm is being purchased for a lawful purpose, and that the answers given in response to questions 2 to 8, inclusive, are, to the best of my knowledge and belief, true, correct, and complete.

9. SIGNATURE OF APPLICANT

10. TITLE *(If not an officer of firm, state whether individual owner.)*

Sheet 2 of this form also must be furnished in duplicate if applicant is an individual.

THE FOLLOWING ITEMS WILL BE COMPLETED BY PERSON DESIRING TO TRANSFER THE FIREARM

11. KIND OF FIREARM *(Machine gun, submachine gun, shotgun or rifle, muffler or silencer, or any other weapon, etc.)*

12. LENGTH OF BARREL *(Inches)*

13. MODEL

14. CALIBER OR GAUGE

15. SERIAL NUMBER

16. OTHER MARKS OF IDENTIFICATION

17. NAME AND ADDRESS OF MANUFACTURER OF FIREARM *(If known)*

18. NAME AND ADDRESS OF TRANSFEROR *(Print or type name of firm or individual.) (Number, Street, City or Town, State, ZIP Code)*

A $5.00 or $200.00 "NATIONAL FIREARMS ACT" stamp, obtainable from your DISTRICT DIRECTOR OF INTERNAL REVENUE, must be securely affixed in this space and canceled by the transferor writing his initials and the date thereon in ink. When completed, this order form must be transmitted in duplicate to the DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, WASHINGTON, D.C. 20224.

19. BY *(Signature)*

20. TITLE OR STATUS *(If not an officer of firm, state whether individual owner. If special-tax payer, give registry number.)*

THE FOLLOWING ITEMS WILL BE COMPLETED BY ALCOHOL AND TOBACCO TAX DIVISION

THE APPLICATION AND ORDER FORM HAS BEEN EXAMINED AND THE TRANSFER OF THE FIREARM DESIGNATED HEREIN IS

☐ APPROVED

☐ DISAPPROVED FOR THE FOLLOWING REASON:

21. DATE

22. SIGNATURE *(Director, Alcohol and Tobacco Tax Division)*

INSTRUCTIONS

1. PREPARATION OF APPLICATION AND ORDER FOR TRANSFER OF FIREARM AND PAYMENT OF TAX.--Pursuant to section 5814 of the Internal Revenue Code, and except as otherwise provided, every person seeking to obtain a firearm must make, in duplicate, a separate application to the transferor on Sheet 1 of this form for each firearm. The transferor must furnish the information called for on Sheet 1 of the form relating to the identification of the firearm.

If the applicant is an individual, he must have Sheet 2 of the form completed, in duplicate, by affixing his fingerprints, attaching to each copy an individual photograph of himself taken within one year of the date of his application, and having all other data and signatures required entered on Sheet 2.

It is preferred that the form be prepared by use of a typewriter, using carbon paper to make an exact duplicate. Pen and ink may be used, but under no circumstances will a form filled in by use of lead pencil be accepted.

Upon completion of the form, the transferor will affix a $5 or $200 "National Firearms Act" stamp in the proper space on the original Sheet 1 only, and cancel such stamp by writing his initials and the date thereon in ink.

If any questions arise concerning the preparation of the form, please contact the nearest Alcohol and Tobacco Tax Office of the Internal Revenue Service.

2. DISPOSITION OF APPLICATION AND ORDER FOR TRANSFER OF FIREARM.—The transferor will forward both copies of the form to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D.C. 20224. If approved, the Director, Alcohol and Tobacco Tax Division, will return the original to the transferor for delivery to the applicant, with the firearm, and will retain the duplicate. The transferor shall not, under any circumstances, deliver the firearm to the applicant until the approved form, with the "National Firearms Act" stamp attached, is received from the Director, Alcohol and Tobacco Tax Division. The form must be retained by the transferee and be available at all times for inspection by Government officers until such time as the firearm may be subsequently transferred. If the application and order form is disapproved, the original with the "National Firearms Act" stamp affixed thereto will be returned to the transferor.

3. PROCEDURE WHERE FIREARM IS NOT TRANSFERRED.--If the form is completed and a stamp is affixed without the transfer of the firearm being made, the transferor may file a claim for redemption of the stamp. The claim, on Form 843, should be filed with the District Director of Internal Revenue for the transferor's district. Such claim must be accompanied by the form to which the stamp is affixed.

4. PROCEDURE WHERE FIREARM IS TO BE SUBSEQUENTLY TRANSFERRED.—Where a firearm is to be subsequently transferred, a new application and order form covering such proposed transfer must be filed with the Director, Alcohol and Tobacco Tax Division.

5. RATE OF TAX ON THE TRANSFER OF A FIREARM.—The tax on the transfer of any firearm is $200, except that the transfer tax is $5 on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5). (Sec. 5811(a), I.R.C.)

6. DEFINITIONS.—

(A) Felony—Any offense punishable by death or imprisonment for a term exceeding one year.

(B) Firearm—The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length; or a rifle having a barrel or barrels of less than 16 inches in length; or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches; or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person; or a machine gun. This term includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. (Sec. 5848(1), I.R.C.)

7. SCOPE OF TAX ON THE TRANSFER OF A FIREARM.--The provisions of section 5814 of the Internal Revenue Code relating to the application and order forms are applicable to persons within the States of the United States and the District of Columbia.

8. WARNING.--It shall be unlawful for any person who has not in his possession a stamp-affixed order (Form 4 (Firearms)), as provided in section 5814 of the Internal Revenue Code, to ship, carry, or deliver any firearm in interstate commerce. (Sec. 5855, I.R.C.)

9. PENALTIES.—ANY PERSON WHO VIOLATES OR FAILS TO COMPLY WITH ANY OF THE REQUIREMENTS OF CHAPTER 53 OF THE INTERNAL REVENUE CODE SHALL, UPON CONVICTION, BE FINED NOT MORE THAN $2,000 OR BE IMPRISONED FOR NOT MORE THAN 5 YEARS, OR BOTH, IN THE DISCRETION OF THE COURT. MOREOVER, ANY FIREARM INVOLVED IN ANY VIOLATION OF THE PROVISIONS OF CHAPTER 53 OF THE INTERNAL REVENUE CODE OR ANY REGULATIONS PROMULGATED THEREUNDER SHALL BE SUBJECT TO SEIZURE AND FORFEITURE.

Alcohol and Tobacco Tax Division
INDIVIDUAL'S APPLICATION AND ORDER FOR TRANSFER OF FIREARM

(Please complete in duplicate.)

PHOTOGRAPH REQUIREMENTS: Before the application can be considered it is necessary that the applicant securely affix to each copy in the space provided below an unmounted photograph of himself taken within one year of the date of the application. This must be done immediately following the taking of fingerprints, in the presence of the person who took the fingerprints. A photograph must at all times be securely attached to each copy of the application. Proofs, tintypes or group photographs will not be accepted.

FINGERPRINT REQUIREMENTS: An individual's application will not be considered unless his clear, unsmudged fingerprints appear on the reverse of each copy hereof. The prints should be taken by someone properly equipped and trained to do so. In addition, the person who takes the fingerprints must enter the identification data required below regarding the applicant, and complete the Fingerprint and Identification Data Certificate.

Affix Photograph Here

(Approx. 2" x 2")

IDENTIFICATION DATA REGARDING THE APPLICANT

23. NAME		24. ADDRESS					
25. SEX ☐ MALE ☐ FEMALE	26. NATIONALITY	27. PLACE OF BIRTH					
28. DATE OF BIRTH	29. HEIGHT	30. WEIGHT	31. BUILD	32. COMPLEXION	33. EYES	34. HAIR	
35. SCARS AND MARKS							

FINGERPRINT AND IDENTIFICATION DATA CERTIFICATION: I hereby certify that the fingerprints on the reverse are those of the applicant, and that the information entered above correctly identifies the applicant.

36. SIGNATURE AND TITLE	37. ORGANIZATION AND ADDRESS	38. DATE

CHARACTER CERTIFICATION REQUIREMENTS: The application of an individual must be supported by character certification made by the local chief of police, sheriff of the county, United States attorney, United States marshal, or another person whose certification is acceptable to the Director, Alcohol and Tobacco Tax Division.

CHARACTER CERTIFICATION: I have no information which would indicate that the applicant will use the firearm for which he has applied for other than lawful purposes.

39. SIGNATURE AND TITLE	40. ORGANIZATION AND ADDRESS	41. DATE

(Do not write below this line)

Prepare in Duplicate – DO NOT FOLD

Alcohol and Tobacco Tax Division

INDIVIDUAL'S APPLICATION AND ORDER FOR TRANSFER OF FIREARM

(Please complete in duplicate after reading requirements on reverse.)

(LEAVE ABOVE SPACE BLANK)

Applicant's Fingerprints

RIGHT THUMB	RIGHT FOREFINGER	RIGHT MIDDLE FINGER	RIGHT RING FINGER	RIGHT LITTLE FINGER
LEFT THUMB	**LEFT FOREFINGER**	**LEFT MIDDLE FINGER**	**LEFT RING FINGER**	**LEFT LITTLE FINGER**

Plain impression of the four fingers taken simultaneously-**LEFT HAND**

Note amputations here

LEFT THUMB	RIGHT THUMB

Plain impression of the four fingers taken simultaneously-**RIGHT HAND**

DO NOT FOLD

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 916

THEODORE VARITIMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1968. The petition for a writ of certiorari was filed on January 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the privilege against self-incrimination barred conviction for various violations of the possession and transfer provisions of the National Firearms Act (26 U.S.C. 5801-5862).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations (26 U.S.C. 5811, 5814, 5821, 5851, 5861; Mass. Laws Ann., ch. 140, §131 (1968) and ch. 269, §10 (1965); 26 C.F.R. 179.95-179.101, 179.170-179.172) are set forth in the appendix, *infra*, pp. 13-20.

STATEMENT

After waiving a trial by jury, petitioner was convicted in the United States District Court for the District of Massachusetts on five counts charging violations of the National Firearms Act (26 U.S.C. 5801-5862). On February 21, 1968, he was sentenced to imprisonment for three years on each count, the terms to run concurrently (R. 12-13). The court of appeals affirmed, finding that, in light of the concurrent sentences, it was necessary only to determine the absence of constitutional infirmity on two similar counts (Pet. App. A).

1. Petitioner was tried on a fourteen-count indictment:

> Counts 1 to 3 and 7 to 10 charged possession or interstate transportation of firearms not registered as required by 26 U.S.C. 5841, in violation of 26 U.S.C. 5851 and 5855.
>
> Counts 4 and 11 charged possession of two different firearms transferred to him not pursuant to an order form as required by 26 U.S.C. 5814, in violation of 26 U.S.C. 5851.
>
> Counts 5 and 12 charged possession of the same two firearms transferred to him without payment of the transfer tax as required by 26 U.S.C. 5811, in violation of 26 U.S.C. 5851.

Counts 6 and 13 charged petitioner with transferring firearms not pursuant to an order form, in violation of 26 U.S.C. 5814 and 5861.

And Count 14 charged petitioner with carrying on a business as a dealer in firearms without payment of the special occupational tax imposed by 26 U.S.C. 5801, in violation of 26 U.S.C. 5861 (R. 5-9).

The relevant evidence (the sufficiency of which is not challenged here) is summarized in the trial court's findings of fact. It showed that on December 13, 1966, petitioner had in his possession and transported in interstate commerce two firearms, namely, a Schmeisser Machine Pistol, Serial No. 3833, and a Schmeisser Machine Pistol, Serial No. 5538/g.[1] Each of these firearms had been transferred without use of the order form or payment of the transfer tax specified in the National Firearms Act (26 U.S.C. 5811, 5814), and neither had been registered as required by 26 U.S.C. 5841. Petitioner transferred the firearm bearing Serial No. 3833 to federal agents (R. 15-17).

2. On January 26, 1968, the trial court acquitted petitioner on Counts 13 and 14 (R. 11-12). Three days later, this Court announced its decision in *Haynes* v. *United States,* 390 U.S. 85, and on February 2, 1968, petitioner moved for judgment of acquittal on all the counts (Counts 1 to 3, and 7 to 10) which were premised upon non-compliance with the registration re-

[1] The firearm bearing Serial No. 3833 was the basis for Counts 1 through 6, while that bearing Serial No. 5538/g was the subject of Counts 7 through 13.

quirements of Section 5841 (R.10). This motion, which the government did not oppose, was granted (R. 10, 12). On February 19, 1968, petitioner's motion to dismiss the remaining five counts on self-incrimination grounds was denied (R. 10-11).

Because concurrent sentences had been imposed on all five counts, the court of appeals fully considered only Counts 4 and 11 charging petitioner with violating 26 U.S.C. 5851 by possessing a firearm which had been transferred to him not pursuant to an order form as required by 26 U.S.C. 5814. In affirming the convictions on those counts, the court below held that petitioner's own failure to complete an order form constituted an element of the crime, but that compliance with that requirement would not have been, in the circumstances, incriminating.

ARGUMENT

Petitioner contends that *Haynes* v. *United States,* 390 U.S. 85, requires reversal on all counts. In our view, neither *Haynes* nor the underlying policy of the Fifth Amendment privilege against self-incrimination requires further review of those counts (Counts 4, 5, 11, and 12) charging unlawful *possession* of a firearm which had been transferred in violation of the Act's order form requirements (26 U.S.C. 5814), or tax requirements (26 U.S.C. 5811). On the other hand, we agree with petitioner's contention and with the suggestion of the court below (Pet. App. A, p. 22, n. 8) that, under the relevant constitutional principles, the conviction on Count 6 charging petitioner with the un-

lawful transfer of a firearm in violation of 26 U.S.C. 5814, 5861, cannot be sustained. We discuss below first the operation of the National Firearms Act as relevant here, and then the validity of the various counts which petitioner seeks to have this Court review.[2]

---

[2] Apart from our view, discussed *post*, that petitioner was validly convicted on four of the five counts on which he was sentenced, we believe there is an additional factor relevant to this Court's exercise of its discretionary jurisdiction. Petitioner contends (Pet. 8-9) that this case raises important questions which have not yet been, but which should be, passed upon by this Court. But as part of the Gun Control Act of 1968, 82 Stat. 1213, Congress effected a "complete revision" (S. Rep. No. 1501, 90th Cong., 2d Sess., p. 20) of the National Firearms Act, under which the present prosecution arose. (The Act as completely redrafted, appears at 82 Stat. 1227-1235.) These substantial changes in the scope, administration, and impact of the National Firearms Act were made with the express purpose of meeting the constitutional objections raised in *Haynes* v. *United States*, 390 U.S. 85, by the *"Elimination of any element of self-incrimination."* H. Conf. Rep. No. 1956, 90th Cong., 2d Sess., p. 35 (emphasis original); see, also, S. Rep. No. 1501, *supra*, pp. 26, 42, 51-52. In light of the congressional correction of the deficiencies found controlling in *Haynes*—the original Act's focus on persons inherently suspect of criminal activities and the possible use of required information in a criminal prosecution—the issues petitioner tenders can no longer arise in a context similar to the present one.

Thus, while petitioner suggests that the petition should be granted for further clarification by this Court as to what constitutes a "real and appreciable" danger of incrimination within the meaning of *Haynes*, *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, the 1968 amendments to the National Firearms Act make it inappropriate to use this case as the vehicle for such analysis. New Section 5848 (82 Stat. 1232) now provides that no "information or evidence obtained from an application, registration, or records" shall be used directly or indirectly, "as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration * * *."

A. *The statutory plan.*[3]

Section 5814, with exemptions not applicable here, requires approval by the Director of the Alcohol and Tobacco Tax Division prior to any transfer of a firearm. In order to obtain such approval, Section 5814 and the implementing regulations (26 C.F.R. 179.98-179.106) provide that the proposed transferee must prepare a special form, giving his name and address, fingerprints and photograph, and must supply a certificate from certain local or federal law enforcement officers to the effect that the fingerprints and photograph are authentic and that possession of the designated firearm would be lawful under state and local law. Once the transferee has completed his portion of the form, the prospective transferor, on the same form, must state his name and address, and describe the firearm, including length of the barrel, the model, the caliber or gauge, the serial number, marks of identification, and name and address of the manufacturer (if known). Once the transferor has completed this portion of the order form, he must satisfy the requirement of 26 U.S.C. 5811 imposing a transfer tax of $200 to be paid prior to the transfer. The payment of the transfer tax is effected by the purchase of a "National Firearms Act" stamp from a local district director of Internal Revenue (26 U.S.C. 5811(c); 26 C.FR. 179.95-179.97, 179.170-179.172). Once the stamp has been purchased, the transferor must attach it to the order form and cancel it by writing his initials and date thereon in ink. Full compliance with the Na-

[3] The following discussion treats the Act as it stood at the time of the offenses in 1966, before it was restructured in 1968.

tional Firearms Act is effected when the order form, with tax stamp attached, is sent to the Director for approval.

B. *The convictions on Counts 4 and 11.*

To ensure compliance with the order form requirements of Section 5814, Section 5851 provides that it is unlawful for any person to receive or possess a firearm which has *at any time* been transferred in violation of that section. As we understand the opinion of the court below, the elements of the crime were construed to be (1) receipt or possession of a firearm; (2) a transfer of the firearm to the accused; and (3) non-compliance *by the accused* with the order form requirements of 26 U.S.C. 5814 (see Pet. App. A, pp. 17-18). Although there is room for argument that the accused's compliance or non-compliance with the order form requirements is not an element of the crime defined by Section 5851, so long as there is a showing that the firearm had been "at any time" transferred in violation of those requirements (see, *e.g., Haynes, supra,* at 92-93), it is unnecessary to reach that question here since there was no such evidence below, and since—in view of the approach taken by the court below—resolution of that issue is unimportant to the disposition of this case. Moreover, the issue of construction does not present a recurring problem requiring resolution by this Court, since the ambiguity has been removed by legislative enactment.[4]

[4] Under new Section 26 U.S.C. 5861(b), enacted as part of the Gun Control Act of 1968, receivers or possessors of illegally transferred firearms may be convicted only if there is proof that the illegal transfer was made *to them* (82 Stat. 1234).

Construing the statute as reaching non-compliance by the transferee with the order form requirement does not render the statute subject to the defense that compliance would have been incriminating for petitioner. There is no doubt—and petitioner does not argue to the contrary—[5] that compliance with the order form requirements would not have resulted in the disclosure of any information incriminating as to federal law. Had he completed the order form, he would have done all that federal law required, and transfer of the firearms would have been legal. Compliance would also not have been incriminating under state law. Although Massachusetts law generally makes the possession of a machine gun unlawful (Mass. Laws Ann., ch. 269, Section 10 (1968)), it has provisions for permission to take possession. Under the provisions of Mass. Laws Ann., ch. 140, Section 131 (1965), any person (with certain exceptions not applicable here) may obtain a license to possess a firearm from the "chief of police or the board or officer having control of the police in city or town, or the commissioner of public safety, or persons authorized by them, respectively" upon

[5] Although not argued by petitioner, it has been suggested elsewhere that if a prospective transferee satisfies the order form requirements of Section 5814, such action would be incriminatory under *federal* law if the firearm had *previously* been transferred in violation of the National Firearms Act. See *United States* v. *Thompson*, Cr. No. 1899 (D. Del.), decided November 19, 1968. That suggestion is premised upon the assumption that a transferee of a firearm is criminally liable for illegal transfers other than that made to him. Inasmuch as there is no evidence here, however, that the firearm had been transferred illegally prior to petitioner's acquisition, there is no need to consider that possibility here. And, as noted above, the Gun Control Act of 1968 has eliminated this danger, since it is now specifically provided that a transferee is criminally liable only for illegal transfers made to him.

a showing that such possession is necessary to protect his person or property, "or for any other proper purpose, including the carrying of firearms for use in target practice only." As noted above, in order to complete his obligation under the federal order form requirements, the intended transferee must obtain a certificate of "the local chief of police, sheriff of the county, United States Attorney, United States marshal or such other person whose certificate may in a particular case be acceptable to the Director," to the effect that possession would be lawful under state law (26 C.F.R. 179.99). Thus, for someone in petitioner's circumstances, the order form requirement created no "real and appreciable" risk of incrimination. *Haynes* v. *United States, supra,* 390 U.S. at 97. The order form itself advises the prospective transferee that it need be forwarded to the Director only if a certificate of lawfulness is obtained (see Pet. App. C, p. 31). If such a certificate could not have been obtained by petitioner, he would have no reason to perform the futile act of forwarding the order form to the Director; if such a certificate of lawfulness had been obtained, possession of the firearm would, by definition, have been lawful under state law, and submission of the order form would not have been incriminatory. Petitioner's convictions, therefore, for possession of firearms transferred (to him) in violation of the order form requirements, present no conflict with the privilege against self-incrimination.

C. *The convictions on Counts 5 and 12.*

In order to ensure that the $200 transfer tax is paid prior to transfer, Section 5851 also makes unlawful

the receipt or possession of any firearm which has at any time been transferred without payment of such tax.[6] Inasmuch as the sentences imposed on Counts 5 and 12—charging petitioner with possession of the two firearms on which the transfer tax had not been paid—were ordered to run concurrently with those imposed upon Counts 4 and 11, the court below did not review the validity of those convictions, except to comment that the convictions "appear to pass muster under *Haynes*" (Pet. App. A, p. 22, n. 8). Even if this Court should decide in *Benton* v. *Maryland,* No. 201, O.T., 1968, that the imposition of concurrent sentences does not preclude appellate review of *all* counts, there would be no reason to remand the case for consideration of the convictions on Counts 5 and 12. Payment of the transfer tax—although effected by the transferor—cannot realistically be severed from the obligation of the transferee to complete *his* portion of the order form prior to the time that the transferor attaches the tax stamp to the order form and forwards it to the Director for approval. Since it is the transferee who must initiate the procedure during which the transfer tax is to be paid, assessment of the hazard that compliance with the tax provisions of the Act might incriminate the transferee is governed by the same considerations as those discussed above with regard to compliance with the order form requirements. For the same reasons, the transferor's payment of the

[6] If the firearm is transferred without payment of the tax, the transferee becomes jointly and severally liable for its payment along with the transferor. 26 U.S.C. 5811(b). There is, however, no provision for a transferee in such circumstance to make voluntary payment of the tax.

tax would not, in the circumstances, have incriminated petitioner. The convictions on Counts 5 and 12 are therefore proper.[7]

D. *The conviction on Count 6.*

The conviction on Count 6, however, charging petitioner with the sale of a firearm to federal agents not in pursuance of an order form, in violation of 26 U.S.C. 5814, presents a quite different situation, and we concede that the conviction cannot be reconciled with the principles announced in *Haynes*. Had petitioner, as a transferor, filed the order form required by Section 5814, he, at the very least, would have admitted ownership and/or possession of the firearm. This admission, coupled with proof that there was no recordation of a transfer previous thereto, would have provided substantial evidence to support a federal conviction for his pre-existing receipt or possession of a firearm transferred in violation of Sections 5814 and 5851. Such a disclosure, therefore, would have been incriminating under *Haynes*, and in the face of his assertion of his privilege petitioner should not have been convicted of failing to comply with Section 5814. Thus, in the event that the Court should decide that, despite the imposition of concurrent sentences, each count must be separately considered, we would suggest that the petition for a writ of certiorari be granted, limited to Count 6, and the cause remanded to the district court with directions to vacate the judgment on that count.

---

[7] The transferee knows whether the transfer tax on the firearm he receives has been paid, because the approved original of the order form, with the tax stamp attached, is to be delivered to him along with the firearm. 26 C.F.R. 179.98.

CONCLUSION

For the reasons stated, we suggest that the petition for a writ of certiorari should either be denied or granted only as to Count 6. In the latter event, the cause should be remanded to the district court with directions to vacate the judgment on that count.

Respectfully submitted.

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FEBRUARY 1969.

APPENDIX

26 U.S.C. 5811 provides in pertinent part:

(a) Rate.

There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200 for each firearm: *Provided,* That the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), shall be at the rate of $5. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

(b) By whom paid.

Such tax shall be paid by the transferor: *Provided,* That if a firearm is transferred without payment of such tax the transferor and transferee shall become jointly and severally liable for such tax.

(c) How paid.

(1) Stamps.

Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

* * * * *

26 U.S.C. 5814 provides in pertinent part:

(a) General Requirements.

It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on

an application form issued in blank in duplicate for that purpose by the Secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: *Provided,* That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) Contents of order form.

Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Secretary or his delegate. The original thereof, with stamp affixed, shall be returned to the applicant.

* * * * *

26 U.S.C. 5821 provides in pertinent part:

(a) Rate.

There shall be levied, collected, and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200 for each firearm so made.

* * * * *

(c) By whom paid; when paid.

The tax imposed by subsection (a) shall be paid by the person making the firearm. Such tax shall be paid in advance of the making of the firearm.

(d) How paid.

Payment of the tax imposed by subsection (a) shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

(e) Declaration.

It shall be unlawful for any person subject to the tax imposed by subsection (a) to make a firearm unless, prior to such making, he has declared in writing his intention to make a firearm, has affixed the stamp described in subsection (d) to the original of such declaration, and has filed such original and a copy thereof. The declaration required by the preceding sentence shall be filed at such place, and shall be in such form and contain such information, as the Secretary or his delegate may by regulations prescribe. The original of the declaration, with the stamp affixed, shall be returned to the person making the declaration. If the person making the declaration is an individual, there shall be included as part of the declaration the fingerprints and a photograph of such individual.

26 U.S.C. 5851 provides:

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant ex-

plains such possession to the satisfaction of the jury.

26 U.S.C. 5861 provides:

> Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than $2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the court.

Mass. Laws Ann., ch. 269, § 10 (1968) provides in pertinent part:

> * * * Whoever, except as provided by law, possesses a machine gun as defined in [c. 140, § 121] without permission under [c. 140, § 131] shall be punished by imprisonment in the state prison for life or for any term of years. . . .

Mass. Laws Ann., ch. 140, § 131 (1965) provides in pertinent part:

> The chief of police or the board or officer having control of the police in city or town, or the commissioner of public safety, or persons authorized by them, respectively, after an investigation, may, upon the application of any person, including a minor eighteen or over who has the written consent of his parent or guardian, residing or having a place of business within their respective jurisdiction, except an alien, a person who has been convicted of a felony or of the unlawful use, possession or sale of narcotic or harmful drugs or a minor under the age of eighteen, issue a license to such applicant to carry firearms in the commonwealth or to possess therein a machine gun, if it appears that he is a suitable person to be so licensed, and that he has good reason to fear injury

to his person or property, or for any other proper purpose, including the carrying of firearms for use in target practice only. * * *

26 C.F.R. 179.95 provides:

Scope of Tax.

Except as otherwise provided (see §§ 179.103 and 179.104), each transfer of a firearm in the United States is subject to tax to be represented by an adhesive stamp of the proper denomination bearing the words "National Firearms Act" (see §§ 179.98, 179.170, and 179.171).

26 C.F.R. 179.96 provides:

Rate of Tax.

The transfer tax imposed with respect to firearms transferred within the United States is at the rate of $200 for the transfer of each firearm, except that, the transfer tax imposed with respect to any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), I.R.C., is at the rate of $5 for the transfer of each such weapon.

26 C.F.R. 179.96a provides:

Liability for tax.

The tax imposed on the transfer of a firearm shall be paid by the transferor, except that, if a firearm is transferred without payment of the proper tax, the transferor and transferee shall be jointly and severally liable for such tax.

26 C.F.R. 179.97 provides:

> Transfer tax in addition to import duty.
>
> The transfer tax imposed by section 5811 of the Internal Revenue Code of 1954 is in addition to any import duty (see § 179.132).

26 C.F.R. 179.98 provides:

> Written application and order required for transfer of firearm.
>
> Except as otherwise provided, no firearm may be transferred in the United States unless a Form 4 (Firearms) covering the transfer of the firearm has been approved by the Director, Alcohol and Tobacco Tax Division, Washington 25, D.C. The person seeking to obtain a firearm must complete the items in Form 4 (Firearms), in duplicate, relating to the applicant, execute said form as the applicant, and then submit the form, in duplicate, to the person transferring the firearm. The person desiring to transfer the firearm will complete the items in the Form 4 (Firearms), in duplicate, relating to such a person, affix to the original a "National Firearms Act" stamp of the proper denomination in the space provided (§179.96), properly cancel such stamp (§ 179.101), execute the said form, and submit the said form, in duplicate, to the Director for approval. Upon approval, the original of the Form 4 (Firearms) will be returned to the transferor, who may then deliver the firearm and the approved original Form 4 (Firearms) to the applicant.

26 C.F.R. 179.99 provides:

Identification of applicant.

If the applicant is an individual, he shall attach to each copy of the application an individual photograph of himself, taken within one year prior to the date of such application, and shall affix his fingerprints to such application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that the firearm is intended by the applicant for lawful purposes.

26 C.F.R. 179.100 provides:

Requirements for approval of application and order for transfer:

The Form 4 (Firearms), must be forwarded, directly, in duplicate, by the transferor to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C. The Director, Alcohol and Tobacco Tax Division, will consider the application for approval or disapproval. If the application is approved, the Director, Alcohol and Tobacco Tax Division, will return the original thereof to the transferor, who may then deliver the firearm to the applicant, together with the original Form 4 (Firearms) with the

"National Firearms Act" stamp attached thereto. If the application is disapproved, the original Form 4 (Firearms) with the "National Firearms Act" stamp attached thereto will be returned to the transferor with the reasons for disapproval stated on the form.

26 C.F.R. 179.101 provides:

Cancellation of stamp.

The same method of cancellation as prescribed in § 179.81 shall be used.

26 C.F.R. 179.170 provides:

Orders for stamps.

Each order for stamps to be used under this part shall be made in writing to the District Director or his duly authorized agent in the internal revenue collection district in which the stamps are to be used, showing the date of the order, the number of "National Firearms Act" stamps applied for, and the name and address of the purchaser, and shall be signed in ink by the purchaser.

26 C.F.R. 179.171 provides:

Stamps authorized.

Adhesive stamps of the $5 and $200 denomination, bearing the words "National Firearms Act," have been prepared and distributed to District Directors, and only such stamps shall be used for the payment of the transfer tax and for the tax on the making of a firearm.

26 C.F.R. 179.172 provides:

Reuse of stamps prohibited.

A stamp once affixed to one instrument cannot lawfully be removed and affixed to another. Any person wilfully reusing such a stamp shall be subject to the penalty prescribed by section 7208 of the Internal Revenue Code of 1954.

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SUPREME COURT, U. S.

MAR 23 1969

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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 916

THEODORE VARITIMOS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

SUPPLEMENTAL BRIEF FOR THE PETITIONER TO PETITION FOR A WRIT OF CERTIORARI.

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SUPPLEMENTAL BRIEF FOR THE PETITIONER TO PETITION FOR A WRIT OF CERTIORARI

Since the filing of the petition for a writ of certiorari herein, the Petitioner's last filing, a new case bearing upon this matter has been decided to which this Honorable Court's attention is respectfully called, pursuant to Rule 24(5) of the Rules of this Court.

In *United States* v. *Miller*, ___ F.2d ___ (4th Cir., February 14, 1969), 4 CRIM. LAW REP. No. 24, p. 2497 (March 19, 1969), the Fourth Circuit retroactively applied this Court's decision in *Haynes* v. *United States*, 390 U.S. 85 (1968), to prosecutions under 26 U.S.C. §5814 (1964) and

held such prosecutions to be barred by the Fifth Amendment. Section 5814 is the same section of the National Firearms Act upon which Counts 4 and 11 of the indictment in this case are based and which the First Circuit found does not violate the Petitioner's privilege against self incrimination. Speaking for the Court in *Miller*, Sobeloff, J., stated:

> Given the reasoning of *Haynes* . . . we perceive no distinction of constitutional scope between the two sections [section 5841, involved in *Haynes*, and section 5814, involved in *Miller* and in the instant case] and are persuaded that the Fifth Amendment forbids prosecution under Sec. 5814(a) as well as under Sec. 5841. . . . (Slip opinion p. 10.)

The significance of the Fourth Circuit's decision in the *Miller* case to the pending petition for a writ of certiorari in this case is two-fold. First, it creates a conflict with the decision of the First Circuit in this case. (See Rule 19(b) of the Rules of this Court.) Second, the decision in the *Miller* case, by giving *Haynes* retroactive effect, increases the number of cases which will arise under the National Firearms Act even beyond the "numerosity of firearm cases pending in the inferior federal courts" referred to in *DePugh* v. *United States*, 401 F.2d 346, 351 (8th Cir. 1968) (cited at pp. 11 and 12 of the Petitioner's initial brief), and makes the settlement by this Court of the questions raised here even more imperative.

Conclusion

For the reasons stated above, as well as for the reasons stated in the petition for a writ of certiorari previously filed, it is respectfully prayed that the pending petition for

a writ of certiorari be granted, that the decision of the court of appeals be reversed, and that the judgment of the district court be vacated.

Respectfully submitted,

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